

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 \*\*\*

4 DANA BAKER,

5 Plaintiff,

6 vs.

7 DONALD DEXTER JR., *et al.*,

8 Defendants.

Case No.: 2:15-cv-00247-GMN-VCF

**ORDER**

MOTION TO ENFORCE COURT ORDERED IME AND  
REQUEST FOR RULE 37 SANCTIONS AGAINST  
PLAINTIFF'S COUNSEL (#14, #16) AND EMERGENCY  
MOTION FOR PROTECTIVE ORDER (#17)

10  
11 This matter involves Dana Baker's personal injury action arising out of a motor vehicle collision  
12 against Donald Dexter Jr. Two motions are before the court: (1) Donald Dexter Jr.'s Emergency Motion  
13 to Enforce Court Ordered IME and Request for Rule 37 Sanctions Against Plaintiff's Counsel (#14,  
14 #16);<sup>1</sup> and (2) Dana Baker's Emergency Motion for Protective Order (#17). For the reasons stated  
15 below, Donald Dexter Jr.'s Emergency Motion to Enforce Court Ordered IME and Request for Rule 37  
16 Sanctions Against Plaintiff's Counsel (#14, #16) is granted in part and denied in part. Dana Baker's  
17 Emergency Motion for Protective Order (#17) is denied.

18 **DISCUSSION**

19  
20 On January 18, 2013, Plaintiff was driving eastbound on Horizon Ridge Parkway in Henderson,  
21 Nevada. She stopped at the direction of construction workers who were directing traffic around the  
22 scene of active road construction. The Defendant struck the Plaintiff's vehicle on the driver's side. This  
23 action followed.

24  
25 <sup>1</sup> Parenthetical citations refer to the court's docket.

1 On March 19, 2015, the court entered a Discovery Plan and Scheduling Order (#10). In pertinent  
2 part, the parties agreed that the Defendant “may” set a Rule 35 medical examination at a time agreed to  
3 by the parties. (*See* #10 at ¶ 3(A)). The Defendant argues that the Plaintiff is in violation of the above  
4 mentioned court order and has repeatedly obstructed Defendant’s right to this court-ordered Rule 35  
5 Examination. (*See* #15 at 2:13-15). The Plaintiff argues that no order has been issued regarding a Rule  
6 35 medical examination, (*see* Pl.’s Resp. #19 at 2:3-7), and the only reference to an IME is in the  
7 Discovery Plan and Scheduling Order (#10). Negotiations over the IME have stalled, which prompted  
8 the instant motions. Baker also wants the Defendant’s proposed expert, Steven McIntire, M.D., to be  
9 precluded from conducting the examination. (*See* #17 at 1). On June 10, 2015, the court held a hearing  
10 on the instant motions. (*See* Mins. Proceedings #20).

11 The Discovery Plan and Scheduling Order (#10) was not, as Defendant argues, a court-ordered  
12 Rule 35 Examination. An enforceable IME order must comply with Federal Rule of Civil Procedure  
13 35(a)(2), which provides that an order (1) “may be made only on motion for good cause and on notice to  
14 all parties and the person to be examined; and (2) must specify the time, place, manner, conditions, and  
15 scope of the examination, as well as the person or persons who will perform it.” FED. R. CIV. P. 35  
16 (a)(2).

17 Plaintiff relied on the following comment in the Notes of Advisory Committee on 1991  
18 amendment which states:  
19

20 The court is thus expressly authorized to assess the credentials of the examiner to assure  
21 that no person is subjected to a court-ordered examination by an examiner whose  
22 testimony would be of such limited value that it would be unjust to require the person to  
undergo the invasion of privacy associated with the examination.

23 Fed. R. Civ. P. 35, Ad. Comm. Notes (1991).  
24  
25

1 An adverse party does not have the power to veto the other party's proposed expert "based upon  
2 allegations of bias when those allegations are based on the fact that the physician generally is retained  
3 by the defense side of a lawsuit." *Pham v. Wal-Mart Stores, Inc.*, No. 2:11-CV-01148-KJD-GW, 2012  
4 WL 1957987, at \*3 (D. Nev. May 29, 2012), citing *inter alia*, *McKitis v. Defazio*, 187 F.R.D. 225, 227-  
5 28 (D.Md.1999).

6 Therefore, as discussed during the hearing, the court ordered that the IME will take place with  
7 Steven McIntire, M.D., in Las Vegas, Nevada, preferably in two weeks. Plaintiff's Emergency Motion  
8 for Protective Order (#17) is denied and Defendant's Emergency Motion to Enforce Court Ordered IME  
9 and Request for Rule 37 Sanctions is denied. (#14, #16).

10 The court has approved the stipulation (#22) filed by the parties on Friday, June 12, 2015. Such  
11 an agreement should have been reached between counsel without court intervention. Both Mr. McGaha  
12 and Ms. Entzminger are experienced, highly competent, and ethical attorneys. Reviewing all relevant  
13 filings and considering the arguments of counsel, the court finds that both sides unreasonably and  
14 unnecessarily compounded these proceedings. What should have been a dispute amenable to resolution  
15 by compromise became a test of wills between counsel. The court's inherent power includes the ability  
16 to enter orders to protect against the wasting of its resources. *See, e.g., Yeti by Molly, Ltd. v. Deckers*  
17 *Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

18 Counsel took unreasonable positions: (1) the Defendant asserting that paragraph 3(A) of the  
19 Discovery Plan and Scheduling Order (#10) was an order issued in compliance with Rule 35(a)(2); and  
20 (2) Plaintiff asserting, in effect, that conducting the proposed IME would be unjust. Accordingly Mr.  
21 McGaha and Ms. Entzminger are each ordered to pay \$50.00 to the crime victims' assistance fund on or  
22 before June 30, 2015. Counsel are admonished to consider their positions carefully before forcing a  
23 discovery dispute into motion practice.  
24  
25

1 ACCORDINGLY, and for good cause shown,

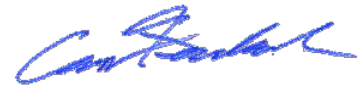
2 IT IS ORDERED that Defendant's Emergency Motion to Enforce Court Ordered IME and  
3 Request for Rule 37 Sanctions Against Plaintiff's Counsel (#14, #16) is GRANTED in part and  
4 DENIED in part.

5 IT IS FURTHER ORDERED that Plaintiff's Emergency Motion for Protective Order (#17) is  
6 DENIED.

7 IT IS FURTHER ORDERED that Mr. McGaha and Ms. Entzminger are each ordered to pay  
8 \$50.00 to the court clerk. The checks must be payable to Clerk, U.S. District Court, will be credited  
9 towards the crime victims' assistance fund, and must be delivered to the clerk's office by 4:00 p.m. on  
10 June 30, 2015.

11 IT IS SO ORDERED.

12 DATED this 15th day of June, 2015.

13  
14 

15 CAM FERENBACH  
16 UNITED STATES MAGISTRATE JUDGE  
17  
18  
19  
20  
21  
22  
23  
24  
25